

The Meaning of "Contribution or Gift" for Charitable Contribution Deduction Purposes

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I. INTRODUCTION

Section 170 of the Internal Revenue Code of 1954 provides a federal income tax deduction for "a contribution or gift to or for the use of"¹ organizations described in section 170(c) of the Code.² Although the charitable contribution deduction has existed since the War Revenue Act of 1917,³ the nature of contributions or gifts that qualify for the deduction is the subject of much litigation and uncertainty. It is clear that a donor will receive a deduction under section 170 if he contributes to a charitable organization, receives no substantial or direct benefit in return for the contribution, and retains no interest in the contributed property other than as a member of the general public.⁴ Two issues arise, however, when a donor receives a direct or substantial benefit that is not received by the general public: first, whether any charitable deduction is allowable; and, second, if a deduction is allowable, how it is to be measured.⁵ These issues have not been satisfactorily resolved by the courts or the Internal Revenue Service. The courts have adopted three apparently inconsistent analyses to decide whether a deduction is allowable and, if so, the amount of the

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1. The terms "contribution or gift" have been held to be synonymous. *DeJong v. Commissioner*, 309 F.2d 373, 376-77 (9th Cir. 1962); *Channing v. United States*, 4 F. Supp. 33, 34 (D. Mass. 1933), *aff'd*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934). It is not clear why both terms are used. See Eliasberg, *Section 170: Recent Developments on the "What," "When" and "How Much" of Charitable Giving*, 44 TAXES 418, 419 n.7 (1966).

2. Section 170(c) describes federal, state and local governments, religious, charitable, scientific, literary or educational organizations, and organizations that foster amateur sports competition. In addition, deductible charitable contributions may be made to some war veterans organizations and some cemetery companies. The organizations described in § 170(c) are, with some exceptions, the same as those that are exempt from income taxation under I.R.C. § 501(c)(3).

3. Ch. 63, title XII, § 1201(2), 40 Stat. 300 (1919). See note 9 *infra*, and accompanying text.

4. See, e.g., Rev. Rul. 79-323, 1979-2 C.B. 106. In this Revenue Ruling the Internal Revenue Service held that contributions to an industrial commission were deductible because "there is no indication that gifts to the commission will inure to the benefit of private interests except indirectly in the course of advancing the public purposes of promoting the economic health and stability of the area." *Id.* at 107. Other examples of incidental benefits are the general benefits the public receives from a hospital that provides improved health care to the community because of contributions to it or the general benefits to the public of improved education that result from contributions to colleges. See, generally *Sutton v. Commissioner*, 57 T.C. 239 (1971); *Citizens and S. Nat'l Bank v. United States*, 243 F. Supp. 900 (W.D.S.C. 1965).

5. Rev. Rul. 67-246, 1967-2 C.B. 104, for example, deals with various situations where a donor receives benefits such as dinner or admission to a performance in return for a payment to a charity. A typical example of this sort would involve a taxpayer who pays ten dollars to his church and receives a dinner worth six dollars in return. Since religious organizations are among those to which deductible gifts may be made under I.R.C. § 170(c), the question is whether and to what extent an income tax deduction will be allowed under § 170. This Revenue Ruling indicates that under these facts, a four dollar deduction would be allowed.

deduction when the taxpayer receives a direct or substantial benefit in return for a transfer to a charitable organization.⁶ Moreover, the Revenue Rulings published by the Internal Revenue Service are in hopeless disarray and seem to adopt all of the courts' inconsistent reasoning, sometimes within the same Revenue Ruling.⁷

This Article first discusses the history and purposes of section 170. Next, it analyzes the reasoning that has been applied to the problems of whether a deduction is allowed and how the deduction is measured when a taxpayer receives a substantial or direct benefit in return for a contribution. Finally, the Article attempts to reconcile the approaches into a single test of deductibility developed from the purposes of the charitable contribution deduction and from the articulated and unarticulated reasoning of the cases and Revenue Rulings. The suggested test was developed to be consistent with the history and purposes of section 170 and to be administratively feasible.

II. HISTORY AND PURPOSE OF SECTION 170

The charitable contribution deduction first appeared in the War Revenue Act of 1917.⁸ The original charitable contribution deduction section allowed a deduction for:

Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of fifteen per centum of the taxpayer's taxable net income as computed without the benefit of this subparagraph.⁹

This provision has been extensively amended over the years and, as Congress amended the law to meet abuses and to provide benefits to organizations that it felt should be helped, has grown from a fairly simple provision to an immensely complex set of rules.

In its present form, section 170(a) provides the statutory basis for the charitable contribution deduction by allowing "as a deduction any charitable contribution . . . payment of which is made within the taxable year."¹⁰ Section 170(c) defines the term "charitable contribution" as "a contribution or gift to or for the use of" various specified types of organizations.¹¹ Although section 170 and the regulations interpreting it provide

6. Each of the following cases contains one of the lines of analysis: *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *De Jong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); The three lines of analysis will be discussed in great detail later in this article.

7. See, e.g., Rev. Rul. 76-185, 1976-1 C.B. 60, and text accompanying note 139 *infra*.

8. Ch. 23, § 1201(2), 40 Stat. 300 (1917).

9. War Revenue Act of 1917, ch. 63, title XII, § 1201(2), 40 Stat. 300 (1917).

10. I.R.C. § 170(a).

11. I.R.C. § 170(c).

complex rules and definitions, the term "contribution or gift" is not defined in the statute or in the Income Tax Regulations.¹² Since there is no definition of "contribution or gift" in section 170, the regulations, or the legislative history of section 170, the courts have developed a definition based on the common law concept of gifts and from analysis of the basic purposes of the charitable contribution deduction.¹³

A common law gift has traditionally been defined as a voluntary transfer of property by one to another without any consideration or compensation returning to the transferor.¹⁴ This definition has been applied generally in charitable contribution deduction cases.¹⁵

Moreover, in order for there to be a valid *inter vivos* gift at common law several specific elements must be satisfied:

- (1) Competency of the donor to contract;
- (2) a voluntary intent on the part of the donor to make the gift;
- (3) delivery, either actual or symbolical, amounting to transfer of title;
- (4) acceptance, actual or imputed;
- (5) complete divestment of all control by the donor; and
- (6) a lack of consideration in return for the gift.¹⁶

In general, these elements also must be satisfied for a transfer to be a deductible contribution for tax purposes under section 170.

There are no cases under section 170 that deal with the first requirement that the donor must be competent to make a gift. It seems logical,

12. *But see* Treas. Reg. § 1.170A-1(c)(5), T.D. 7207, 1972-2 C.B. 106:

Transfers of property to an organization described in section 170(c) which bear a direct relationship to the taxpayer's trade or business and which are made with a reasonable expectation of financial return commensurate with the amount of the transfer may constitute allowable deductions as trade or business expenses rather than as charitable contributions.

See section 162 and the regulations thereunder.

This regulation section implies that a donor will not receive a charitable contribution deduction if the donor receives a commensurate return benefit.

13. Whether a transfer is a gift is important in several areas of tax law in addition to the charitable contribution deduction area. For example, I.R.C. § 2501(a)(1) imposes a gift tax on "the transfer of property by gift." The courts have had to develop definitions of gifts for gift tax purposes under § 2501. *See, e.g.,* Commissioner v. Wemyss, 324 U.S. 303 (1945).

In addition, under I.R.C. § 102(a) "the value of property acquired by gift" is excluded from gross income for income tax purposes. The courts and the Internal Revenue Service have had to develop definitions of gifts for purposes of I.R.C. § 102. *See, e.g.,* Commissioner v. Duberstein, 363 U.S. 278 (1960); Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift,"* 48 MINN. L. REV. 215 (1964).

14. *See* Forsyth v. Reynolds, 56 U.S. (15 How.) 358, 365 (1853); Ellerson v. Grove, 44 F.2d 493, 496 (4th Cir. 1930).

Other cases have adopted slightly different forms of this definition. *See, e.g.,* Turnbull v. Thomson, 171 Cal. App. 2d 779, 783, 341 P.2d 69, 72 (1959) ("A gift is a transfer of personal property, made voluntarily and without consideration."); Combs v. Roark's Adm'r, 221 Ky. 679, 681, 299 S.W. 576, 578 (1927) ("[A] gift is a parting by the owner with his property without pecuniary consideration.").

15. *See, e.g.,* Murphy v. Commissioner, 54 T.C. 249, 252 (1970); DeJong v. Commissioner, 36 T.C. 896, 899 (1961), *aff'd* 309 F.2d 373 (9th Cir. 1962). This general definition also has been adopted for use in determining whether a gift has been made for the income tax exclusion for gifts under I.R.C. § 102. *See, e.g.,* Botchford v. Commissioner, 81 F.2d 914 (9th Cir. 1936); Fitch v. Helvering, 70 F.2d 583 (8th Cir. 1934); Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929). It has also been adopted for gift tax purposes. *See, e.g.,* Commissioner v. Montague, 126 F.2d 948 (6th Cir. 1942).

16. *In re* Estate of Miller, 143 Cal. App. 2d 544, 549, 299 P.2d 1005, 1008 (1956).

however, that a transfer by a person who was not competent to make a gift for state law purposes would also not be a contribution or gift for charitable contribution deduction purposes because the attempted transfer would not be effective to transfer any property to the charity. Thus, the charity would receive nothing and the deduction would appropriately be disallowed.

The third element of a common law gift, delivery of the money or property, is required for a deductible contribution under section 170. This is reflected in the Income Tax Regulations that state: "Ordinarily, a contribution is made at the time delivery is effected."¹⁷ Thus, if property does not pass to a charity because there has not been delivery, a charitable contribution deduction will not be allowed. This is a reasonable result because the charity will receive no benefit from the attempted gift and the property will remain in the hands of the donor or other noncharitable parties such as the donor's heirs.

Section 170 probably also requires satisfaction of the fourth common law element that the donee accept the gift. Although there appears to be no authority on this point, it would be illogical to allow a deduction for an attempted gift that has not been accepted by the charity because the charity would not have received a benefit. In addition, if the gift has not been accepted, there will be no completed gift for local law purposes and the charity may never receive a benefit.

Section 170 also requires satisfaction of the fifth common law element, complete divestment of control over the donated property, in order for the gift to be deductible. The provisions of section 170 that deal with gifts of future interests, partial interests, and the effective dates of gifts specifically disallow a deduction if the donor has not completely divested control over the property. Thus, section 170(a)(3) provides that a contribution of a future interest in tangible personal property "shall be treated as made only when all intervening interests in, and rights to the actual possession or enjoyment of, the property have expired or are held by persons other than the taxpayer. . . ."¹⁸ The Income Tax Regulations define future interest to include:

situations in which a donor purports to give tangible personal property to a charitable organization, but has an understanding, arrangement, agreement, etc., whether written or oral, with the charitable organization which has the effect of reserving to, or retaining in, such donor a right to the use, possession, or enjoyment of the property.¹⁹

Section 170(f)(3) disallows a deduction for the contribution of a partial interest in property that does not satisfy the rigid requirements

17. Treas. Reg. § 1.170A-1(b), T.D. 7207, 1972-2 C.B. 106, 116. *See also* Broussard v. Commissioner, 16 T.C. 23 (1951); *Estate of Spiegel v. Commissioner*, 12 T.C. 524 (1949).

18. I.R.C. § 170(a)(3).

19. Treas. Reg. § 1.170A-5(a)(4), T.D. 7207, 1972-2 C.B. 106, 128.

applicable to contributions placed in trust.²⁰ Therefore, if a donor retains control over the donated property that is extensive enough to be a partial interest, the deduction may be denied.²¹

In addition, the requirement of complete divestment of control of donated property by the donor in order for the gift to be deductible is reflected in the Income Tax Regulations providing:

If as of the date of a gift a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible.²²

Therefore no deduction will be allowed if a donor retains the power to prevent the transfer from becoming effective.

The case law substantiates the general requirement that the donor must divest complete control in order for a transfer to qualify as a contribution under section 170. In *Burroughs Corp. v. Commissioner*,²³ the taxpayer transferred land that it had owned for many years to a trust and leased the property back for use as a recreational facility for its employees. Under the trust agreement, the taxpayer had the power to remove trustees, appoint successor trustees, and to terminate the trust and reacquire the property. In holding that the power and control that was retained precluded a deduction, the court cited *Smith v. Shaughnessy*²⁴ for the proposition that a gift has not been made if the donor does not abandon control over the property and retains the power to recapture the property or to make other disposition of the property.

The result of the provisions dealing with gifts of future interests, partial interests, and the effective dates of gifts is that, in general, there will be no deduction if the donor has not completely divested himself of control over the property.

The common law elements of gifts discussed above generally apply to charitable contribution deductions but cause few problems of interpretation. The common law also requires, however, that a gift be without consideration and that it be made with donative intent. It is in these areas

20. I.R.C. § 170(f)(3). Under I.R.C. § 170(f)(3), no deduction is allowed for the contribution of a remainder interest in trust unless the trust is a charitable remainder annuity trust or charitable remainder unitrust under I.R.C. § 664 or a pooled income fund under I.R.C. § 642(c)(5). No deduction is allowed under I.R.C. § 170(f)(3) for the contribution of an income interest in trust unless the charity receives a guaranteed annuity or the charity receives a fixed percentage distributed yearly of the fair market value of the trust property and the grantor is treated as the owner of the interest under I.R.C. § 671 dealing with grantor trusts.

21. *But see* I.R.C. § 170(f)(3)(B). This section contains exceptions to this rule for contributions of remainder interests in personal residences or farms, undivided portions of the taxpayer's entire interest in property, and for contributions of leases, options to purchase, easements and certain remainders.

22. Treas. Reg. § 1.170A-1(e), T.D. 7207, 1972-2 C.B. 106, 117.

23. 33 T.C. 389 (1959).

24. 318 U.S. 176 (1943).

that there are difficulties and confusion with respect to charitable contribution deductions. The common law requirement that a gift be without consideration and that it be made with donative intent was generally applied to charitable contribution deductions until 1962.

*Wardwell Estate v. Commissioner*²⁵ shows the reasoning that was used in section 170 cases before 1962. In this case the taxpayer, an invalid, paid a "room endowment" to a home for the elderly where she was to live for the rest of her life. The Eighth Circuit reversed the Tax Court and held that the "room endowment" was a deductible contribution. In reaching this conclusion, the court stated that the question to be answered was "What was her 'intention' at the time the contribution or gift in question was actually made. . . ." ²⁶ The court distinguished the donor's intentions from motives or expectations.

Similarly, the court determined that the donor had not received consideration in return for the "room endowment," quoting *Philpott v. Gruninger*.²⁷

It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration for the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the cause or meritorious recompense in fact or in law.²⁸

In 1962, the Ninth Circuit decided *DeJong v. Commissioner*,²⁹ a case that applied the "detached and disinterested generosity" test of section 102(b),³⁰ first articulated by the Supreme Court in *Commissioner v. Duberstein*³¹ to determine if a transfer was a gift for section 170 purposes. Since 1962, a number of cases have followed *DeJong* and concluded that the reasoning of *Duberstein* should be used in charitable contribution cases under section 170.³² Other cases, however, have concluded that the reasoning of *DeJong* is incorrect and that the *Duberstein* "detached and disinterested generosity" test does not apply to charitable contribution cases.³³ Thus, there is confusion about what donative intent is necessary to

25. 301 F.2d 632 (8th Cir. 1962).

26. *Id.* at 636.

27. 81 U.S. (14 Wall.) 570 (1871).

28. *Id.* at 577.

29. 309 F.2d 373 (9th Cir. 1962).

30. I.R.C. § 102(b).

31. 363 U.S. 278 (1960).

32. *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976); *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975); *McLaughlin v. Commissioner*, 51 T.C. 233 (1968), *aff'd*, 69-2 U.S. Tax Cas. ¶9468 (1st Cir. 1969).

33. *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967).

make a deductible contribution and about the effect of consideration received by the donor.

III. ALLOWABILITY AND MEASURE OF CHARITABLE CONTRIBUTION DEDUCTIONS WHEN THE DONOR RECEIVES BENEFITS FROM THE CONTRIBUTION

The question of what donative intent is required under section 170 to make a deductible gift arises most often when the donor receives a return benefit from the transfer. One common factual situation involves payments to a charity with benefits in the form of goods or services returned to the donor. Examples are payments to a charity that provides admission to dinners or entertainment events for the donor³⁴ or payments to a school that provides education to the children of the donor.³⁵ A second common factual situation involves transfers of land to a governmental agency in return for the right to construct buildings³⁶ or because the land is about to be taken by eminent domain by the government agency.³⁷ The third major category of litigation with respect to whether a transfer is made with the necessary intent involves the relationship between the charitable contribution deduction under section 170 and the business expense deduction under section 162.³⁸ In the last type of case, the characterization of a transfer as a charitable contribution would result in the loss of deductions under both section 162 and section 170.³⁹

Three lines of analysis have been developed by the courts and the Internal Revenue Service to deal with the transferor's deduction under these circumstances. The first line of reasoning assumes that the definition

34. See, e.g., Rev. Rul. 67-246, 1967-2 C.B. 104.

35. See, e.g., *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978); Rev. Rul. 79-99, 1979-1 C.B. 108.

36. See, e.g., *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976); *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971); *Saba v. Commissioner*, 40 T.C.M. (CCH) 446 (1980).

37. See, e.g., *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975).

38. See, e.g., *Marquis v. Commissioner*, 49 T.C. 695 (1968), *acq.*, 1971-2 C.B. 3.

39. Section 170(b) limits the percentage of the taxpayer's contribution base (as defined in § 170(b)(1)(E)) or taxable income that may be deducted. For example, § 170(b)(2) provides that the deduction allowed to corporations may not exceed five percent of the corporation's taxable income, subject to certain adjustments. Section 170 limits the time of payment and the dollar amount of certain deductible payments.

Section 162(a) allows deductions for ordinary and necessary business expenses, but § 162(b) disallows business expense deductions for payments that would have been allowable as charitable contribution deductions were it not for the limitations of § 170. Thus, if a corporation transfers an amount in excess of five percent of its taxable income to a charity, it is to the taxpayer's advantage to have the transfer not considered as charitable contribution, but as an ordinary and necessary business expense deductible under § 162(a). Thus, in some situations a conclusion that an amount transferred to a charity is not a contribution or gift under § 170 will be beneficial to the taxpayer because this conclusion will allow the amount transferred to be deducted as an ordinary and necessary business expense under § 162(a).

of the term "contribution or gift" for section 170 purposes is the same as the definition of "gift" for section 102 income exclusion purposes. Therefore, according to some cases, the Supreme Court's analysis in *Commissioner v. Duberstein*⁴⁰ applies with full force to charitable contribution cases under section 170.

Duberstein arose under section 22(b)(3) of the Internal Revenue Code of 1939,⁴¹ which provided that gifts were not to be included in the gross income of the donees. The taxpayer, Duberstein, was the president of a corporation that had done business for a number of years with Berman, the president of another corporation. In the course of their dealings, Duberstein gave Berman the names of potential customers for Berman's products. Berman told Duberstein that the information Duberstein had provided was so valuable that Berman wanted to give a Cadillac automobile to Duberstein as a gift. Duberstein apparently had not expected the gift and it was not given by Berman to pay any debt or satisfy any obligation. Duberstein accepted the Cadillac insisting that he had not intended to be compensated for the information he gave Berman.

Duberstein did not include the value of the automobile in his gross income and the Internal Revenue Service asserted a deficiency against him based on the value of the automobile. Berman's company, however, deducted the value of the automobile from its income as a business expense, classifying its cost as a "finder's fee" paid to Duberstein.

Thus, the issue in *Duberstein* was whether the value of the Cadillac was excludable from Duberstein's income as a gift under what is now section 102.⁴² There was no issue involving charitable contribution deductions and the Court did not consider the definition of contributions or gifts for charitable contribution deduction purposes. The Court reversed the Court of Appeals for the Sixth Circuit and held that the Tax Court's determination that there was no gift for section 102 purposes was not clearly erroneous and should be sustained.⁴³

In reaching its conclusion, the Court rejected the government's proposed test that: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."⁴⁴ The Court in discussing the term "gift" said:

The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefore, though a common-law gift, is not necessarily a "gift" within the meaning of the statute.

40. 363 U.S. 278 (1960).

41. Revenue Act of 1938, ch. 289, § 22(b)(3), 52 Stat. 458 (1938).

42. I.R.C. § 102.

43. 363 U.S. 278, 291-92 (1960).

44. *Id.* at 284, n.6.

For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. . . . And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature . . . it is not a gift. And conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." . . . A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," . . . "out of affection, respect, admiration, charity or like impulses." . . . And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." . . . "What controls is the intention with which payment, however voluntary, has been made."⁴⁵

In addition, the court said that "[d]ecision of the issue presented in these cases must be based ultimately on application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case."⁴⁶

The Supreme Court in *Duberstein*, therefore, created a test of "detached and disinterested generosity" measured by "the mainsprings of human conduct" to be used in determining whether a gift has been made for purposes of the income exclusion for gifts provided by section 102. *Duberstein*, however, involves only what is now section 102 and does not in any way involve the charitable contribution deduction under section 170. Therefore, the unresolved question is whether the reasoning of *Duberstein* applies to define "contribution or gift" for purposes of section 170. The courts and the Internal Revenue Service have adopted a variety of conflicting viewpoints that are difficult to reconcile.

In *DeJong v. Commissioner*,⁴⁷ the Ninth Circuit decided that the *Duberstein* "detached and disinterested generosity" test applied to section 170. In *DeJong*, the taxpayers sent their children to a school that was operated by a religious organization, the Society for Christian Instruction.⁴⁸ The Society charged no tuition, but raised part of its funds from parents of students at the school. The parents were given a general idea of what the costs of educating the children would be and were asked to contribute "to the best of their ability and to try to carry as much 'of the load as they feel they can'."⁴⁹ Although approximately twenty percent of the Society's total income came from parents of enrolled students, no student was denied admission to the Society's schools because his parents did not contribute.

45. *Id.* at 285-86 (citations omitted).

46. 363 U.S. 278, 289 (1960).

47. 309 F.2d 373 (9th Cir. 1962).

48. The Society for Christian Instruction was stipulated to be a tax-exempt organization described in § 501(c)(3). *Id.* at 374. Although there was no specific finding that the Society was also described in § 170(c) as an organization to which deductible charitable contributions could be made, the Society appeared clearly to be an organization described in § 170(c) and the decision assumed that it was.

49. 309 F.2d 373, 375 (9th Cir. 1962).

The taxpayers paid \$1,075 to the school for the 1958 calendar year and claimed the entire amount as charitable contribution deduction. The Internal Revenue Service disallowed \$400 of the claimed deduction but allowed a deduction of \$675 as a charitable contribution. The Tax Court sustained the disallowance of the \$400 as nondeductible tuition.⁵⁰

The Ninth Circuit pointed out that there were few "helpful decisions construing the meaning of the terms 'charitable contribution' or 'charitable gift' as used in § 170."⁵¹ But rather than analyzing the purposes of section 170, the Ninth Circuit adopted the *Duberstein* "detached and disinterested generosity" test without considering whether the same test should be used in defining a gift for section 170 purposes as that used for section 102 purposes. After quoting extensively from *Duberstein*, the Ninth Circuit said that the *Duberstein* criteria "are clearly applicable to a charitable deduction under § 170."⁵² Based on this reasoning, the Ninth Circuit affirmed the Tax Court's holding that \$400 of the \$1,075 paid to the Society was not deductible because it was tuition.

In *DeJong*, the taxpayers paid \$1,075 to the Society, and were allowed a charitable deduction of \$675. Because the Ninth Circuit held that the *Duberstein* "detached and disinterested generosity" reasoning applied to charitable contribution deduction cases, it must have determined that the payment of \$675 was motivated by "detached and disinterested generosity," and was not motivated by "the incentive of anticipated benefit of an economic nature."⁵³ The court also must have decided, under the *Duberstein* reasoning, that the remaining \$400 paid by the parents was not motivated by the necessary generous motives and therefore was a nondeductible tuition payment.

Although it does not discuss the point, the Ninth Circuit must have considered the transaction in *DeJong* to have been in two parts, with different income tax treatment for each part. Moreover, the only way the Ninth Circuit's holding can be reconciled with *Duberstein* is to view the transaction as two transactions: the first transaction was a nondeductible tuition payment of \$400 to the Society and the second was a deductible contribution of \$675 that was motivated by "detached and disinterested

50. 36 T.C. 896. Tuition payments are non-deductible personal or family expenses. In *Channing v. United States*, the court stated:

As a lexicographic proposition, it can also be conceded that the word "contribution" may properly be employed in referring to payments of tuition. Nevertheless, as a legal proposition, I cannot believe that Congress ever intended to give to the act an interpretation wide enough to admit payments made by a taxpayer as a price for a service rendered. The colleges and schools provided instruction and maintenance for a price, namely, tuition. While in a sense the payment of the price involved the idea of a contribution to the institution for educational purposes, there was no such voluntary donation to the purposes of education as was contemplated by the act. 4 F. Supp. 33, 34 (D. Mass. 1933), *aff'd per curiam*, 67 F.2d 986 (1st Cir. 1933), *cert. denied*, 291 U.S. 686 (1934).

51. 309 F.2d 373, 377 (9th Cir. 1962).

52. *Id.* at 379.

53. *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960).

generosity” and “out of affection, respect, admiration, charity or like impulses.”⁵⁴

Thus, even though the Ninth Circuit purported to base its decision in *DeJong* on an analysis of the intentions and generosity of the donors, the holding of the case was apparently reached by simply subtracting the value of the education received, \$400, from the total amount transferred, \$1,075, to arrive at the amount deductible, \$675. It is difficult to escape the feeling that the court first decided that \$675 more was given to the Society than the value of the education received in return and that, therefore, the transfer of \$675 was made because of “detached and disinterested generosity.”⁵⁵

The Ninth Circuit has applied the test developed in *DeJong* to cases involving the transfer of land to a government agency in return for a benefit to the donee.⁵⁶ For example, in *Collman v. Commissioner*,⁵⁷ the taxpayer transferred land to a county for the construction of roads. He agreed to dedicate 2.549 acres to the county in exchange for a promise to construct roads wider than the interim width roads planned by the county. The county also agreed to construct gutters and curbs. The county would have required 1.759 (value at \$33,314) of the 2.549 acres to build the roads to their interim width and would have condemned the 1.759 acres if the taxpayer had not agreed to dedicate the property. The additional .79 acres was the amount of land necessary to build the roads to their wider width. The additional cost to the county to build the roads wider was \$20,711. More than a year later the taxpayer petitioned for and was granted a zoning change for part of his land.

Under these facts the Tax Court held that the taxpayers were entitled to deduct only the value of the 1.759 acres (\$33,314), less the cost to the county of constructing the roads beyond their interim widths (\$20,711).⁵⁸ The Tax Court held that the conveyance of the other .79 acres used to widen the roads was not a charitable contribution because that conveyance was made for the business purpose of obtaining zoning changes.⁵⁹ The Ninth Circuit reversed the Tax Court’s decision that the transfer of the .79 acres was not deductible because the evidence did not support the Tax

54. *Id.*

55. Viewed this way, the treatment is similar to the treatment of bargain sales to charities. See *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); Treas. Reg. § 1.170A-4(c)(2), T.D. 7207, 1972-2 C.B. 106; cf. I.R.C. § 1011(b) (concerning adjusted basis for determining gain or loss on a bargain sale to a charity). In a bargain sale, a taxpayer sells property to a charity for less than its value and deducts the excess of the value over the sale price as a charitable contribution. *DeJong*, in effect, involved taxpayers who purchased educational services from a charity, but who paid more for the services than their value. In both the bargain sale to a charity and the *DeJong* situation, the taxpayer transfers something of value to a charity and receives something of lesser value in return. A deduction is allowed for the difference.

56. See *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976); *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975); *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971); *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968).

57. 511 F.2d 1263 (9th Cir. 1975).

58. 32 T.C.M. (CCH) 416 (1973).

59. *Id.* at 423-24.

Court's conclusion that there was lack of donative intent. The court, however, upheld the Tax Court's conclusion that the allowable deduction must be reduced by the value of the construction work performed by the county for Collman. Thus, the result of the decision of the Tax Court, as modified by the Ninth Circuit, was identical to the result reached in *DeJong*, since the taxpayer was allowed a charitable contribution deduction for the value of the property transferred, less the value of the benefits he received in return.

To reach this conclusion, the Ninth Circuit again must have treated the factual situation as two transactions, with different legal effects for each, as it did in *DeJong*. One transaction was a deductible transfer made, under the *Duberstein* test, with the necessary "detached and disinterested generosity" and the other part was a nondeductible transfer that lacked the necessary "detached and disinterested generosity." The court appeared not to recognize that the effect of its decision was to treat the facts as two transactions, each with different legal consequences. The transaction, however, must have been broken into two parts to make the analysis and conclusion consistent with *Duberstein*.

The Ninth Circuit has not consistently applied the transaction splitting approach of *DeJong*. For example, in *Allen v. United States*,⁶⁰ the Ninth Circuit approved a decision of the district court that allowed a deduction for the entire value of land transferred to a county in connection with the taxpayer's efforts to obtain necessary permission to build a housing development. Judge Williams, in a dissenting opinion, believed that the transfer was not made with the necessary "detached and disinterested generosity," but was motivated by the "expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming."⁶¹ Thus, he would have disallowed all of the deduction. Accordingly, both the majority and the dissent treated the transaction as a single one requiring the deduction to be allowed or disallowed in its entirety.⁶² Neither appears to have considered viewing the transaction as, in reality, part "contribution or gift" and part business transfer, as was done in *DeJong* or in *Collman*. On close analysis, therefore, the reasoning that supports the conclusion in *Allen* appears to be inconsistent with other decisions from the Ninth Circuit.

In general, the weight of authority in all circuits is in favor of the application of the *Duberstein* "detached and disinterested generosity" test

60. 541 F.2d 786 (9th Cir. 1976).

61. *Id.* at 789, quoting *Stubbs v. United States*, 428 F.2d 885, 887 (9th Cir. 1970).

62. In *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), and *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968), the Ninth Circuit used reasoning similar to Judge Williams' to disallow deductions for transfers of land in their entirety. The court did not allow a deduction for the excess of the value of what was given over what was received in return, as was done in *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) and in *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975).

to charitable contribution cases.⁶³ The *DeJong* reasoning has been followed by the Second⁶⁴ and Tenth Circuits.⁶⁵ In addition, some Tax Court decisions have adopted the *DeJong* approach.⁶⁶ Nevertheless, not all courts follow *DeJong*. The First Circuit⁶⁷ and the Seventh Circuit⁶⁸ have rejected the “detached and disinterested generosity” test and have adopted other means of analyzing charitable contribution deduction cases.

The First Circuit, in *Crosby Valve & Gage Co. v. Commissioner*,⁶⁹ was the first to reject the *DeJong* reasoning. In *Crosby Valve & Gage Co.*, the court affirmed the Tax Court’s holding that a payment by a business corporation to a charitable organization that owned the corporation was not deductible. The First Circuit disagreed with the Tax Court’s reliance on the “detached and disinterested generosity” reasoning:

While agreeing with the holding of the Tax Court, we think it necessary to register our disagreement with the majority’s emphasis upon a purely charitable motive as a prerequisite for a deductible charitable contribution. Were the deductibility of a contribution under section 170(c) of the Internal Revenue Code of 1954 to depend on “detached and disinterested generosity”, an important area of tax law would become a mare’s nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality. Community goodwill, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige, conscience-salving, a vindictive desire to prevent relatives from inheriting family wealth—these are only some of the motives which may lie close to the heart or so-called heart, of one who gives to a charity. If the policy of the income tax laws favoring charitable contributions is to be effectively carried out, there is good reason to avoid unnecessary intrusions of subjective judgments as to what prompts the financial support of the organized but non-governmental good works of society.⁷⁰

Moreover, the court did not believe that the subjective judgments required by the *DeJong* analysis were necessary. Rather, the taxpayer’s payment of tuition was “clearly ‘personal . . . or family expenses’, Int. Rev. Code of 1954, § 262, rather than ‘gifts or charitable contributions’.”⁷¹ In addition, the court rejected the *DeJong* test because the policy behind section 170 was not only different from the policy of section 102, but also would be

63. See *Disinterested Generosity: An Emerging Criteria of Deductibility Under Section 170*, 1968 UTAH L. REV. 475, for an analysis of the law up to 1968.

64. In *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972), the Second Circuit considered facts virtually identical to *DeJong* and affirmed the Tax Court’s disallowance of the entire amount paid to an education fund used to finance a church operated school attended by the taxpayers’ children. The court apparently believed that the entire amount paid to the fund was nondeductible tuition.

65. *Dowell v. United States*, 553 F.2d 1233 (10th Cir. 1977).

66. See, e.g., *McLaughlin v. Commissioner*, 51 T.C. 233 (1968), *aff’d, per curiam*, 69-2 U.S. Tax Cas. ¶9467 (1st Cir. 1969).

67. *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967).

68. *Sedam v. United States*, 518 F.2d 242 (7th Cir. 1975); *Mason v. United States*, 513 F.2d 25 (7th Cir. 1975).

69. 380 F.2d 146 (1st Cir. 1967).

70. *Id.* at 146-47 (footnotes omitted).

71. *Id.* at 147.

frustrated were the court to apply the section 102 test to charitable contribution cases.⁷²

The First Circuit continued its rejection of *DeJong* in *Oppewal v. United States*,⁷³ a case similar to *DeJong*. In *Oppewal*, the taxpayer gave money to a Society for Christian Instruction that provided education for the taxpayers' children. Although no specific amount of tuition was required to be paid, the First Circuit affirmed the Tax Court's holding that part of the money paid to the Society was nondeductible tuition; however, it allowed a deduction for the rest of the amount paid. The First Circuit once again rejected *DeJong's* subjective test in favor of an objective test saying:

The more fundamental objective tests is—however the payment was designated, and whatever motives the taxpayer had in making it, was it, to any substantial extent, offset by the cost of services rendered to taxpayers in the nature of tuition? If so, the payment to the extent of the offset, should be regarded as tuition for, in substance, it served the same function as tuition.⁷⁴

Therefore, on virtually identical facts, the Ninth Circuit in *DeJong* and the First Circuit in *Oppewal* reached identical holdings—that is, the part of the payment that represented the cost of education received was not deductible, but the excess was deductible. Rather than basing its decision on the *Duberstein* conception of “detached and disinterested generosity,” “the mainsprings of human conduct,” or other subjective factors, however, the First Circuit reached its conclusion by a simple mathematical process of subtracting the value of the education received from the amount transferred to the charity. The excess was allowed as a charitable contribution deduction, without regard to the taxpayer's state of mind in making the transfer.

While not expressly rejecting the “detached and disinterested generosity” test, the Seventh Circuit has adopted a position that does not follow

72. *Id.* Specifically, the court said:

What is confusing in such cases and in the Tax Court's opinion is reference to the law excluding from the gross income of individuals the value of property acquired by gift. See *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 S. Ct. 1190, 4 L.Ed.2d 1218 (1960). For in such cases it is important to scrutinize the motive of the transferor, to prevent the disguising of compensation for services rendered, e.g., *Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 76 S. Ct. 800, 100 L.Ed.1142 (1956), and allow exclusion only of property given from “a detached and disinterested generosity”, *Robertson v. United States*, 343 U.S. 711, 72 S. Ct. 994, 96 L.Ed. 1237 (1952). While the law recognizes gifts to individuals and organizations other than charities, it does not so positively encourage them. And, particularly when the transfer of property without consideration is made beyond a family setting and in a business atmosphere, it is properly subjected to a searching inquiry as to the real motivation of the transferor.

But in the case of a contribution to a charitable organization, the law's policy finds charity in the purposes and works of the qualifying organization, not in the subjective intent of the contributor.

73. 468 F.2d 1000 (1st Cir. 1972).

74. *Id.* at 1002; See Comment, *Deductions for Charitable Contributions - An Objective Test*, 8 SUFFOLK U. L. REV. 349 (1974).

the reasoning of *DeJong*. In *Sedam v. United States*,⁷⁵ the Seventh Circuit refused to enter into the controversy over whether "detached and disinterested generosity" is necessary for a deduction, saying:

We need not enter that dispute in order to decide this case. It is at least clear that a payment is not a contribution or gift under section 170 if it is made with the expectation of receiving a commensurate benefit in return, as we find to be true here.⁷⁶

In *Mason v. United States*,⁷⁷ a case involving a bargain sale,⁷⁸ the Seventh Circuit concentrated on the value question after holding that a jury's conclusion that a gift had been made was supported by the evidence. It held that since the taxpayer at the time of the gift did not expect to receive a financial benefit commensurate with the amount transferred to the charity, the excess of the amount transferred over the amount received in return was deductible.⁷⁹

In 1969, the United States Court of Claims decided *Singer Co. v. United States*,⁸⁰ a case that establishes the third line of analysis used in charitable contribution deduction cases. The Singer Company was a manufacturer and supplier of sewing machines that were sold at full price to the public and at discount to certain individuals and charitable organizations. The machines sold to charitable organizations were discounted either twenty or forty-five percent. Therefore, the charities paid either seventy-five or fifty-five percent of the retail price for the machines.⁸¹

The Court of Claims first determined that these were bargain sales to the charitable organizations and that any allowable deductions would be measured by the retail sale price of the machines. The government contended that the *Duberstein* "detached and disinterested generosity" reasoning applied to section 170 cases and should be used. After a careful review of the case law, the Court of Claims rejected the government's reasoning, saying that the *Duberstein* test

is obviously not one that can be applied with the assumption that the most judicious approach to the problem has been used. It is for the above reason,

75. 518 F.2d 242 (7th Cir. 1975).

76. *Id.* at 245; however, the court did say that "[t]he taxpayer's intention governs, not his characterization of the payments 'contributions' or 'gifts.'" *Id.*

77. 513 F.2d 25 (7th Cir. 1975).

78. See note 55 *supra*.

79. The Court's reasoning involved two steps. First, the court concluded that there was a bargain sale. That is, the taxpayer sold valuable assets for less than their fair market value. Therefore, the transaction was partly a sale and partly a gift. Second, the court determined the value of the gift, measured by the difference between the value of the transferred assets and the payment received for them.

80. 449 F.2d 413 (Ct. Cl. 1971).

81. The Singer Company sold machines to schools at a 45% discount; that is, schools paid 55% of the market price for the machines. It sold machines at a 25% discount to churches and some charitable organizations and at a 45% discount to other charitable organizations, including the Red Cross, public hospitals and government agencies.

plus a feeling of uneasiness about using such an approach, that we avoid resting our decision on the "disinterested generosity" rules.⁸²

In rejecting the *DeJong* analysis, the Court of Claims relied upon the legislative history of section 162(b) of the Code,⁸³ which emphasizes that charitable gifts are "those contributions which are made with no expectation of a financial return commensurate with the amount of the gift."⁸⁴ The Court of Claims went on to say, in language that is often quoted:

It is our opinion that if the benefits received, or expected to be received, are substantial, and meaning by that, benefits greater than those that inure to the general public from transfers for charitable purposes (which benefits are merely *incidental* to the transfer), then in such case we feel the transferor has received, or expects to receive, a *quid pro quo* sufficient to remove the transfer from the realm of deductibility under section 170. With this standard, we feel that the subjective approach of "disinterested generosity" need not be wrestled with. . . .⁸⁵

Based on this reasoning, the Court of Claims concluded that the discounts allowed to public and private schools were "of a business nature and not charitable."⁸⁶ In reaching this conclusion, the Court of Claims quoted from the report of its Commissioner that the discounts to the school were offered

for the *predominate* purpose of encouraging those institutions to interest and train young women in the art of machine sewing; *thereby* enlarging the future potential market by developing prospective purchasers of home sewing machines and, more particularly, Singer machines—the brand on which the future buyers learned to sew.⁸⁷

The Court of Claims, therefore, concluded that "the plaintiff's predominate reason for granting such discounts was other than charitable . . . plaintiff expected a return in the nature of future increased sales. This expectation, even though perhaps not fully realized, provided a *quid*

82. 449 F.2d 413, 422 (Ct. Cl. 1971).

83. H. R. REP. NO. 1337, 83rd Cong., 2d Sess., A44, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4013, 4180; S. REP. NO. 1622, 83rd Cong., 2d Sess. 196, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4621, 4830-31. These committee reports read:

Subsection (b) is derived from section 23(a)(1)(B) of the 1939 Code. This section provides that no business deduction is available for any contribution which would be deductible as a charitable gift, were it not for the percentage limitation on such gifts. This was the rule for corporations under section 23(a)(1)(B) of the 1939 Code and this section now extends the rule to individuals. No substantive change is made in the application of this rule. As under present law, it applies only to gifts, i.e., those contributions which are made with no expectation of financial return commensurate with the amount of the gift. For example, the limitation would not apply to a payment by an individual to a hospital in consideration of a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any *quid pro quo* from the hospital.

84. 449 F.2d 413, 422 (Ct. Cl. 1971).

85. *Id.* at 423 (emphasis in original).

86. *Id.* at 424.

87. *Id.* at 423 (emphasis in original).

pro quo for those discounts which was substantial.”⁸⁸ Thus, the Court of Claims, even though it rejected the “detached and disinterested generosity” test of *Duberstein*, did consider the taxpayer’s reasons and purposes for granting the discounts, and denied the deduction because the taxpayer expected a substantial return benefit.

With respect to discounts allowed to charities other than schools, the Court of Claims approved the conclusion of its Commissioner that the

primary purpose of such discounts was to assist the recipient organizations in the performance of the charitable, religious or public services that they were currently providing. The incidental effect of this policy was the development and maintenance of a favorable public image for plaintiff in the eyes of those organizations and their members.⁸⁹

The Court of Claims went on to say that “[s]uch a finding, together with our agreement therewith, makes it difficult to see how the plaintiff could derive substantial benefits from such discounts in the way of increased sales.”⁹⁰ The Singer Company therefore, was allowed to deduct the amount of the difference between the discount price at which the machines were sold and the retail price.

The reasoning in *Singer* is inconsistent with its conclusion. The Court of Claims began its analysis by saying that no charitable contribution deduction will be allowed if the donor receives a *quid pro quo* in the form of a substantial return benefit. The facts clearly show, however, that the Singer Company received a cash payment of either fifty-five or seventy-five percent of the retail price of each machine in return for its transfer to a charity. The receipt of money equal to more than half of the value of the machines is clearly a substantial benefit “greater than those that inure to the general public from transfers for charitable purposes,”⁹¹ regardless of whatever other benefits were received, such as goodwill or advertising.

In reaching the conclusion that the discounts allowed to some of the charities were deductible, the Court of Claims appears to have concluded that the only transfer made to the charities was the value of the discounts. That is, if a machine with a retail value of one hundred dollars was sold to a church for seventy-five dollars, the Court of Claims considered only whether the twenty-five dollar discount resulted in a substantial return benefit. However, the Singer Company transferred a value of one hundred dollars, and received in return seventy-five dollars in cash and additional

88. *Id.* at 424. Examples of incidental benefits would be the general benefits received by the public from a hospital that provides improved health care to the community because of contributions to it. Another example of incidental benefits would be the general benefits to the public from improved education resulting from contributions to schools. *See generally* *Citizens and S. Nat’l Bank v. United States*, 243 F. Supp. 900 (W.D.S.C. 1965); *Sutton v. Commissioner*, 57 T.C. 225 (1971); Rev. Rul. 80-77, 1980-12 I.R.B. 8; Rev. Rul. 67-446, 1967-2 C.B. 119.

89. 449 F.2d 413, 424 (Ct. Cl. 1971).

90. *Id.*

91. *Id.* at 423.

valuable benefits in the form of future sales and goodwill. There is no logical reason why the cash and the goodwill should not be considered together in determining whether there was a substantial return benefit to the donor for the transfer of a machine at a bargain price.

Because the Court of Claims considered only whether the amount in excess of the sale price was transferred in return for substantial return benefits, the Court of Claims must have conceptually divided the transfer into two parts, as was done by the Ninth Circuit in *DeJong*. To use the previous example of a sale of a one hundred dollar machine for seventy-five dollars, seventy-five dollars of the value of the machine was treated as a transfer for which a *quid pro quo* was received in return and, therefore, no deduction was allowed. The other twenty-five dollars of value transferred was treated as a transfer for which no *quid pro quo* was received and was, therefore, allowed as a deduction.

Alternatively, *Singer* might be viewed as standing for the proposition that when a return benefit is received by the donor that is less than the total value transferred, that part of the value transferred that is equal to the value received in return is not deductible because there is a *quid pro quo*, but that the value transferred in excess of what was received in return is deductible. Viewed in this manner, the *Singer* test would be identical to the *Oppewal* test; however, even though *Singer* reached the same conclusion as *Oppewal*, *Singer* has been cited as holding that if any substantial return benefit is received, no deduction will be allowed regardless of whether the return benefit is of less value than the amount transferred to the charity.⁹²

The Court of Claims in *Singer* therefore has developed a third method of analyzing charitable contribution deductions. Under the *Singer* test, a taxpayer may not deduct any part of the value of a transfer to a charity if there is substantial return benefit, regardless of whether the return benefit is commensurate with the value transferred. On the other hand, if the return benefit is merely incidental, a deduction will be allowed.⁹³

In summary, the courts of appeals and the Court of Claims have developed three lines of analysis with respect to the intent necessary for a deduction to be allowed under section 170. First, several courts of appeals have adopted the *Duberstein* "detached and disinterested generosity" test.⁹⁴ Second, other courts of appeals have adopted an objective test that rejects the *Duberstein* reasoning and allows a deduction for the difference between the amount given and the value of the benefits received in return.⁹⁵ Finally, the third type of analysis used is based on the Court of Claims decision in *Singer Co. v. United States*,⁹⁶ which holds that if the donor

92. See Rev. Rul. 76-257, 1976-2 C.B. 52.

93. See note 88 *supra*.

94. See, e.g., *Dowell v. United States*, 553 F.2d 1233 (10th Cir. 1977); *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962).

95. See, e.g., *Mason v. United States*, 513 F.2d 25 (7th Cir. 1975); *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972).

96. 449 F.2d 413 (Ct. Cl. 1971).

receives a substantial benefit (which need not be commensurate with the amount transferred to the charity) in return for the transfer, no deduction will be allowed. *Singer* specifically rejects the "detached and disinterested generosity" test of *Duberstein*.⁹⁷

The Tax Court has decided a number of cases on the issue of charitable contribution deduction involving return benefits.⁹⁸ The Tax Court's decisions, however, are inconsistent in their analysis of the issue.⁹⁹ Some Tax Court decisions follow the *DeJong* adaptation of the *Duberstein* "detached and disinterested generosity" test.¹⁰⁰ Other Tax Court decisions question whether the *DeJong* reasoning should be used in charitable contribution cases.¹⁰¹ In addition, some Tax Court cases have adopted, to a certain extent, the *Singer* reasoning.¹⁰²

In *Grinslade v. Commissioner*,¹⁰³ the taxpayers conveyed land to a municipality under an agreement with the municipality that allowed the taxpayer to develop land. The Tax Court held that the taxpayers "entered into the entire transaction with the expectation of financial benefits commensurate with the value of the property conveyed."¹⁰⁴ Accordingly, they were not entitled to a charitable contribution deduction under section 170. *Grinslade*, therefore, followed the reasoning of *Oppewal* by looking to whether the return benefit was commensurate (rather than merely substantial, as in *Singer*) in order to determine whether a deduction was to be allowed.

In 1978, the Tax Court in *Dockery v. Commissioner*,¹⁰⁵ retreated from its application of the *Duberstein* test in charitable contribution cases

97. *Id.* at 418-23.

98. See, e.g., *Louisville & Nashville R.R. v. Commissioner*, 66 T.C. 962 (1976) (transfer of easement for business purposes); *Sutton v. Commissioner*, 57 T.C. 239 (1971) (transfer of easement to municipality in return for permit to develop land); *Wolfe v. Commissioner*, 54 T.C. 1707 (1970) (payment for water and sewer systems); *Murphy v. Commissioner*, 54 T.C. 249 (1970) (adoption expenses); *McLoughlin v. Commissioner*, 51 T.C. 233 (1968) (tuition payment); *Howard v. Commissioner*, 39 T.C. 833 (1963) (payment for privilege of practicing medicine in a hospital); *Wood v. Commissioner*, 39 T.C. 1 (1962) (payment for maintenance of a cemetery plot).

99. Inconsistency in the Tax Court's holding may be required by the Tax Court's policy of following a controlling decision of the Court of Appeals to which an appeal would lie, even if the conclusion is contrary to other Tax Court opinions. See *Golson v. Commissioner*, 54 T.C. 742, 756-58 (1970).

Therefore in a case that would be appealed to the Ninth Circuit, the Tax Court would follow *DeJong*. In a case that would be appealed to the First Circuit the Tax Court would follow *Oppewal*.

100. See, e.g., *Fausner v. Commissioner*, 55 T.C. 620 (1971); *Wolfe v. Commissioner*, 54 T.C. 1707 (1970); *Howard v. Commissioner*, 39 T.C. 833 (1963).

101. See, e.g., *Marquis v. Commissioner*, 49 T.C. 695 (1968); *Perlmutter v. Commissioner*, 45 T.C. 311 (1965).

102. See, e.g., *Dockery v. Commissioner*, 37 T.C.M. (CCH) 317 (1978); *Louisville & Nashville R.R. v. Commissioner*, 66 T.C. 962 (1976); but see *Saba v. Commissioner*, 40 T.C.M. (CCH) 446 (1980).

103. 59 T.C. 566 (1973).

104. *Id.* at 577.

105. 37 T.C.M. (CCH) 317 (1978). This case contains original reasoning and a careful analysis of an unsettled area of the law. It is curious, therefore, that this case is a memorandum decision rather than a regular Tax Court decision.

and held that the *Singer* test is to be used, at least where the contribution is made by a business organization.¹⁰⁶ In *Dockery*, the taxpayer promised a city that he would install a six inch water pipeline in return for the city's promise to pay one-half of the cost of the pipeline. After constructing the pipeline, the taxpayer conveyed it to the city as was required by the city ordinances. Later, the taxpayer connected a one-inch pipeline in order to serve buildings used in his business. The taxpayer contended that a charitable contribution deduction should be allowed. The court thoroughly reviewed the application of the *Duberstein* reasoning and stated that: "[W]hile the *Duberstein* criteria may still hold validity with respect to charitable contributions made by individuals . . ., we believe these criteria are inappropriate to determine if a business entity, such as a corporation or partnership has made a charitable contribution entitling it to a deduction under section 170."¹⁰⁷ The Tax Court pointed out that it had noted the *Singer* test with approval in *Louisville & Nashville Railroad v. Commissioner*,¹⁰⁸ stating, however, that although its holding also relied upon the *DeJong* test, it

did not apply the rigid *Duberstein* criteria for which *DeJong* might also be noted, but rather cited it for the more limited proposition that a gift is a voluntary transfer of property by the owner without receiving consideration therefor from the donee. This is a less restrictive test than *Duberstein* for clearly there are instances in which a business entity may make a donation with less than a "disinterested generosity" and yet receive little or no benefit therefrom. Under *Duberstein*, such donations would be denied the benefits of section 170. Similarly, there are instances in which a business may make a donation without receiving consideration from the donor and yet reap a substantial benefit therefrom.¹⁰⁹

Thus, the court held that the taxpayers received consideration sufficient to deny them a deduction, and in the alternative, that "petitioners herein received benefits which were greater than those received by other members of the public, none of whom benefited in any respect from the lines installation . . . and that the . . . water line . . . was constructed primarily from the expectation of a direct benefit for their busi-

106. *Id.* The Tax Court cited Treas. Reg. § 1.170-1(c)(1) T.D. 6605, 1962-2 C.B. 73 and § 1.170A-1(c)(5) T.D. 7207, 1972-2 C.B. 106. These regulation sections state that

[t]ransfers of property to an organization described in section 170(c) which bear a direct relationship to the taxpayer's trade or business and which are made with a reasonable expectation of financial return commensurate with the amount of the transfer may constitute allowable deductions as trade or business expenses rather than as charitable contributions.

107. 37 T.C. M. (CCH) 317, 320-21 (1978). The Tax Court discussed and cited *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976); *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968); *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); *Marquis v. Commissioner*, 49 T.C. 695 (1968); *Perlmutter v. Commissioner*, 45 T.C. 311 (1966). Although the cases cited by the Tax Court do point out the problems of the "detached and disinterested generosity" test as applied to business entities, *Dockery* is the only case that clearly holds that a different test is to be used with respect to contributions by business organizations from the test applicable to individuals.

108. 66 T.C. 962 (1976).

109. 37 T.C.M. (CCH) 317, 321-22 (1978) (footnotes omitted).

ness. . . ."¹¹⁰ The Tax Court also concluded that part of the transfer resulted in no benefit to the general public and thus was not deductible in that the transfer was for the exclusive benefit of a private real estate developer.¹¹¹ Accordingly, the court adopted the *Singer* reasoning.¹¹²

The Tax Court, therefore, appears to have had considerable difficulty in deciding how to analyze charitable contribution cases. The inconsistent reasoning of its cases attests to this difficulty. Some Tax Court decisions adopt the *Duberstein* "detached and disinterested generosity" test;¹¹³ other cases rely upon *Singer*, a case that rejects the *Duberstein* reasoning;¹¹⁴ and in some cases it is difficult to see what reasoning was used.¹¹⁵ In addition, the Tax Court in *Dockery v. Commissioner*,¹¹⁶ created a new test with respect to charitable contributions by business entities.

In view of the judicial confusion, one might expect that the Internal Revenue Service would adopt one view or another and consistently apply it to all cases. This has not happened. In its published Revenue Rulings, the Internal Revenue Service has adopted all three views of what a gift is and has never tried to explain or reconcile the inconsistencies. Thus, the Internal Revenue Service appears to be even more confused than the courts about the definition of a gift for the purposes of section 170.¹¹⁷ Although there are no Revenue Rulings that directly discuss whether the *Duberstein* reasoning applies to charitable contribution deductions, *Duberstein* has been cited with respect to charitable contribution deductions.¹¹⁸ *Duberstein*, however, has not been cited in certain recent Revenue Rulings even though these Rulings derive from factual situations that would logically require a discussion of *Duberstein*.¹¹⁹

110. *Id.* at 322. In reaching this conclusion, the Tax Court cited *Wolfe v. Commissioner*, 54 T.C. 707 (1970), a factually analogous case.

111. 37 T.C.M. (CCH) 317, 322 (1978).

112. There was, however, inconsistent dicta. The Tax Court said that: "Although a deduction under section 170 is allowed for the excess of the amount transferred over the amount of financial or economic benefit received on the transfer, . . . we do not believe that petitioners are entitled to deduct the incremental cost borne in constructing the larger line." *Id.*

This statement is inconsistent with the holding of the case in that *Dockery* disallows the deduction because there is a substantial return benefit and does not consider or allow a deduction for the excess of the amount transferred over the amount of benefit received in return, as was done in *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972) and in *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962).

113. See generally cases cited in note 100 *supra*.

114. See generally cases cited in note 101 *supra*.

115. See, e.g., *Babilonia v. Commissioner*, 40 T.C.M. (CCH) 485 (1980); *Saba v. Commissioner* 40 T.C.M. (CCH) 446 (1980).

116. 37 T.C.M. (CCH) 317 (1978).

117. The Internal Revenue Service has refused to reply to the question of whether the *Duberstein* analysis applies to § 170. Letter from Anthony Manzanara, Jr., Chief, Individual Income Tax Branch to James W. Colliton (August 24, 1979).

118. See Rev. Rul. 71-112, 1971-1 C.B. 93; Rev. Rul. 71-269, 1971-1 C.B. 93.

119. See, e.g., Rev. Rul. 79-99, 1979-1 C.B. 108, a Revenue Ruling based on facts essentially identical to those of *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972), *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962). See also Rev. Rul. 79-148, 1979-1 C.B. 93, (involving a payment to a charity as a condition of probation); Rev. Rul. 78-232, 1978-1 C.B. 69, and Rev. Rul. 78-189, 1978-1 C.B. 68.

The last Revenue Ruling to cite *Duberstein* is Revenue Ruling 71-269¹²⁰ dealing with the repayment of financial assistance provided to high school students to encourage them to pursue higher education. The students signed loan agreements that were unenforceable because the students were minors when they signed the agreements. The ruling cites *Duberstein* and *DeJong* in holding that the repayments were considered to be for the benefits received and that there was no voluntary transfer that would give rise to a charitable contribution deduction.¹²¹ The Internal Revenue Service has not cited *Duberstein* in a Revenue Ruling since the publication of Revenue Ruling 71-269.

Since the publication of Revenue Ruling 71-269, some Revenue Rulings have relied on the *Singer* reasoning in holding that a donor who receives a substantial benefit that is greater than the benefit that would inure to the general public will not be allowed a section 170 deduction. For example, in Revenue Ruling 76-257,¹²² the taxpayers were land owners in a rural area who pledged a sum of money to a county on condition that the county pave roads near the taxpayers' property. The taxpayers issued a promissory note to the county for the amount of the pledge conditioned and payable upon completion of the project. The Revenue Ruling holds that the amounts paid to the county were not deductible because "the taxpayer could reasonably expect to receive benefits substantially greater than those that would inure to the general public."¹²³ The Revenue Ruling does not compare the value of what the taxpayers gave with the value of having the roads paved, nor does it conclude that the value received by the taxpayer was commensurate with the value given up.¹²⁴

Some Revenue Rulings interpret the *Singer* reasoning to allow no deduction if a payment to a charity is consideration for a contract.¹²⁵ For example, in Revenue Ruling 71-112,¹²⁶ the taxpayers paid 5X dollars "tuition fee" to a school attended by their children and 10X dollars as a "donation" required to be given to the school as a condition of enrollment. The Revenue Ruling holds that "payments of both the tuition fee and the so-called 'donation' represents consideration between the parties. Therefore, each lacks a donative intent and is not a gift for purposes of section 170 of the Code."¹²⁷ The Revenue Ruling does not consider whether the

120. 1971-1 C.B. 93. See also Letter Ruling 7102040200A, note 145 *infra*.

121. *Duberstein* is also cited in Rev. Rul. 71-112, 1971-1 C.B. 93 for the proposition that "[i]f a payment proceeds primarily from the incentive of anticipated benefit to the payer beyond the satisfaction which flows from the performance of a generous act, it is not a gift."

122. 1976-2 C.B. 52.

123. *Id.* at 52.

124. This Revenue Ruling appears to be inconsistent with other Revenue Rulings that allow deductions under similar circumstances. See Rev. Rul. 67-446, 1967-2 C.B. 119.

125. In a contract sense, a consideration necessary to support a contract need not be commensurate with the value received. See L. Simpson, *SIMPSON ON CONTRACTS*, 86-87 (2d ed. 1965).

126. 1971-1 C.B. 93.

127. *Id.* at 93.

value of the education received is commensurate with the payments in determining that the "donation" part of the payment could not be deducted.¹²⁸ The Internal Revenue Service has cited *Singer* in other Revenue Rulings, but it is not clear whether the reasoning of *Singer* was in fact used to reach a conclusion.¹²⁹

The third line of reasoning to be found in the Revenue Rulings is similar to that used by the Court of Appeals for the First Circuit in *Oppewal v. Commissioner*.¹³⁰ *Oppewal*, it will be remembered, rejected the *Duberstein* "detached and disinterested generosity" test in favor of an objective test of whether the payment was "to any substantial extent, offset" by the value of the services received in return.¹³¹

The Internal Revenue Service has recently adopted the *Oppewal* position in Revenue Ruling II 79-99.¹³² This Revenue Ruling deals with payments to a church-related educational society that provided education to the taxpayer's child.¹³³ The Revenue Ruling holds that the "taxpayer is not entitled to a charitable contribution deduction since the taxpayer's payments to the society do not exceed the fair market value of the child's education."¹³⁴ In reaching this conclusion the Internal Revenue Service said, citing *Oppewal*:

However the payment is designated, and whatever the taxpayer's motive in making it, the test to be applied is whether the payment was, to any substantial extent, offset by the fair market value of services rendered to the taxpayer in the nature of tuition. If so, the payment, to the extent of the offset, should be regarded as nondeductible tuition.¹³⁵

128. Rev. Rul. 71-112, *Id.*, is inconsistent with Rev. Rul. 70-15, 1970-1 C.B. 20. In Rev. Rul. 70-15, the taxpayer purchased an annuity contract from a charity. The amount paid for the contract was in excess of its fair market value at the time of purchase. The Revenue Ruling holds that "the amount paid . . . for the annuity in excess of its fair market value at the time of purchase is a charitable contribution. . . ." Therefore, Rev. Rul. 70-15 holds that a mandatory "donation" that is consideration for an annuity is deductible in part. See also Treas. Reg. 1.170A-1(d), T.D. 7207, 1972-2 C.B. 106, 117.

129. See Rev. Rul. 76-257, 1976-2 C.B. 52.

130. 468 F.2d 1000 (1st Cir. 1972).

131. *Id.* at 1002.

132. 1979-1 C.B. 108. Legislation is now pending before Congress to prevent the enforcement of this Revenue Ruling by the Internal Revenue Service. S. 1705, 96th Cong., 1st Sess., 125 CONG. REC. S 11696 (1979). This legislation provides:

No amount paid to a corporation, community chest, fund, or foundation described in subsection (c)(2) shall be denied treatment as a charitable contribution under subsection (a) solely because of any educational benefit or other service received by the taxpayer or any other person from such corporation, community chest, fund or foundation, or a related organization, except to the extent that the payment is made subject to an express instruction or designation, written or verbal, that the payment will be used or applied for the direct benefit of the taxpayer or a member of his family.

133. The facts in this Revenue Ruling are virtually identical to those in *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972); *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); and *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978).

134. 1979-1 C.B. 108, 109.

135. *Id.* at 108-09. Congress apparently does not, however, approve of the conclusions reached by the Internal Revenue Service in Revenue Ruling 79-99, and has denied funds for its enforcement in

Revenue Ruling 76-232¹³⁶ contains the best statement of the *Oppewal* approach. In this Revenue Ruling, the taxpayers participated in a weekend marriage seminar conducted by a church. The taxpayers were not required to pay a fee for the service, but were encouraged to donate to the organization at the end of the weekend. The Revenue Ruling states:

If the transferor receives (or reasonably expects to receive) a financial benefit that is commensurate with the money or property transferred, no deduction under section 170 is allowable. . . . If the transferor receives (or reasonably expects to receive) a financial benefit that is substantial but less than the amount of the transfer, then the transaction may involve both a purchase and a gift, and, assuming the requirements in that section are otherwise met, a deduction under that section would be allowable for only the excess of the amount transferred over the amount of the financial benefit received or reasonably expected to be received by the transferor.¹³⁷

This Revenue Ruling also holds that "the taxpayer is not entitled to a charitable contribution deduction for any part of the donations made to the charitable organization at the close of the weekend marriage seminar unless the taxpayer establishes that the amount donated exceeded the

the Treasury, Postal Service and General Appropriations Act of 1980, Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979). The prohibition of the Dornan Amendment to this Act applied only for the fiscal year ending September 30, 1980. Congress is now, however, considering extension of the Dornan Amendment to the fiscal year ending September 30, 1981. H.R. 7583, 96th Cong., 2d Sess. (1980).

Section 614 of the 1980 Appropriations Act (the "Dornan Amendment") provides that no funds were appropriated

to carry out any revenue ruling of the Internal Revenue Service which rules that a taxpayer is not entitled to a charitable deduction for general purpose contributions which are used for educational purposes by a religious organization which is an exempt organization as described in section 170 (c) (2) of the Internal Revenue Code of 1954.

Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979). The legislative history makes it clear that it was intended to prohibit enforcement of Revenue Ruling 79-99. 125 Cong. Rec. H5975-6 (daily ed. July 16, 1979) (remarks of Rep. Dornan).

The Dornan Amendment has created more confusion and uncertainty in an already confused area. There are four judicial decisions on facts virtually identical to those of Revenue Ruling 79-99, all of which reach the same conclusion as that reached in the Revenue Ruling, although the analysis used varies among the cases. *See Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *Winters v. Commissioner*, 468 F.2d 778 (2d Cir. 1972); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1968).

The Dornan Amendment prohibits enforcement of Revenue Ruling 79-99 based directly on the reasoning of one of the cases, *Oppewal*, but does not explicitly change the law upon which *Oppewal* and the Revenue Rulings are based, nor does it expressly overrule *Oppewal*. Thus, it is unclear whether *Oppewal* is still effective as a precedent. *See Parnell, Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1381-83 (1980).

Assuming that the Dornan Amendment does overrule *Oppewal*, it provides no guidance about whether the other cases that reach the same conclusion as *Oppewal*, but which employ different reasoning, are also overruled. Thus Congress, by using the inappropriate and perhaps unconstitutional device of refusing to appropriate funds for the enforcement of Revenue Ruling 79-99, *see id.* at 1381-86, has thrown the law into chaos with respect to contributions to religious schools when a benefit is received in return. Congress has told us that a different rule applies to contributions to religious schools, but has not seen fit to change the statute to tell us what the rule is. Legislation was introduced in 1979 to amend section 170 to allow deductions of the type denied in *Oppewal* and Revenue Ruling 79-99. S. 1075, 96th Cong., 1st Sess. (1979). This Bill was not enacted, however. As a result, even the congressional position on this issue appears hopelessly ambiguous.

136. 1976-1 C.B. 62.

137. *Id.* at 62.

monetary value of all benefits and privileges received and that the amount claimed as a charitable contribution is the amount of such excess.”¹³⁸

The Internal Revenue Service therefore has used each of the three lines of reasoning in its Revenue Rulings. It has, however, never compared the various tests it has used. It has merely adopted one or another of the tests for purposes of the specific Revenue Ruling. The result is Revenue Rulings that cannot be reconciled.

The high water mark of confusion was reached in Revenue Ruling 76-185.¹³⁹ This ruling involves a taxpayer who paid for the restoration of a historic mansion owned by a state. In return for restoring the mansion, the taxpayer was given the right to live in it for 15 years. The ruling cites *Singer* for the proposition that if the taxpayer receives benefits greater than those that inure to the general public, no deduction is allowed. Then it cites *Oppewal* for the proposition that if substantial benefits greater than those that would inure to the general public are received by the donor, a deduction is allowed measured by the difference between the monetary value of what was given and the value of what was received. It also cited *DeJong and Transamerica Corporation* for no apparent reason. Thus, in one paragraph, the Internal Revenue Service not only adopts both the *Singer* and *Oppewal* rationales, but also cites *DeJong*.¹⁴⁰ The holding of the Revenue Ruling, however, follows the *Oppewal* reasoning.

138. *Id.* It is interesting to note that although Rev. Rul. 76-232, 1976-1 C.B. 62 and Rev. Rul. 76-257, 1976-2 C.B. 52 were published by the Internal Revenue Service less than one month apart, they adopt reasoning that cannot be reconciled. Rev. Rul. 76-257 (published on June 21, 1976), discussed above, deals with payments to a county for building roads. It adopts the *Singer* rationale that holds that because the taxpayers receive “benefits substantially greater than those that would inure to the general public” no deduction is allowed. Rev. Rul. 76-232 (published on July 12, 1976), on the other hand, follows the *Oppewal* rationale and holds that even though the taxpayers receive a marriage renewal seminar, which is clearly not a benefit that inures to the general public, part of the payment may be deductible. *But see* note 135 *supra*, concerning the apparent congressional emasculating of Revenue Ruling 79-99, 1979-1 C.B. 108. In light of the similar underpinnings of both Revenue Ruling 76-232 and Revenue Ruling 79-99—*Oppewal*—the continued viability of Ruling 76-232 may be in doubt. At the very least, the congressional action described in note 135 adds more confusion to this area of tax law.

139. 1976-1 C.B. 60.

140. The ruling states, in pertinent part:

For purposes of section 170 of the Code, a contribution or gift is a voluntary transfer of money or property made by the transferor without receipt or expectation of a financial or economic benefit commensurate with the money or property transferred. See section 1.170A-1(c)(5) of the Income Tax Regulations; *H.R. Rep. No. 1337* 83rd Cong., 2d Sess. A44 (1954); *S. Rep. No. 1622*, 83rd Cong., 2d Sess. 196 (1954). If the transferor receives, or can reasonably expect to receive, a financial or economic benefit that is commensurate with the money or property transferred, no deduction under section 170 is allowable. *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968); *Harris W. Seed*, 57 T.C. 265, 278 (1971). Further, if the transferor receives, or can reasonably expect to receive, sufficiently substantial benefits, that is, benefits that are greater than those that would inure to the general public from a transfer for charitable purposes, generally no deduction under section 170 is allowable. *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971). However, if the transferor receives, or can reasonably expect to receive, a financial or economic benefit that is substantial but less than the amount of the transfer, then the transaction may involve both a purchase and a gift, and a deduction under section 170 would only be allowable, assuming the requirements in that section are otherwise met, for the excess of the amount transferred over the amount of the financial or economic benefit received or reasonably expected to be received by the transferor. *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *Harold DeJong*, 36 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962). *Id.* at 60-61.

The Letter Rulings of the Internal Revenue Service have been similarly inconsistent. For example, one recent Letter Ruling¹⁴¹ follows the *Oppewal* reasoning that denies the deduction only for amounts commensurate with the return benefit.¹⁴² On the other hand, another recent Letter Ruling¹⁴³ holds, citing *Singer*, that if the donor receives any return benefits greater than those that inure to the general public, the entire deduction will be denied.¹⁴⁴ *Duberstein* has not been cited in a Letter Ruling since 1971.¹⁴⁵

Thus, both the courts and the Internal Revenue Service have adopted three different lines of reasoning in deciding charitable contribution deduction cases. Circuit courts have adopted one or another of the tests. The Tax Court has been inconsistent as to what test to use. Moreover, the Internal Revenue Service has enthusiastically adopted all three tests. The law, therefore, is in a state of great confusion.

In view of the confused state of the law, the question arises as to whether it is possible to reconcile the cases and Revenue Rulings. In the cases and rulings, the courts and the Internal Revenue Service seem first to determine whether a taxpayer has actually given up something and whether the charity has received anything of value. If there has been a transfer of something of value, both the courts and the Internal Revenue Service generally allow a deduction for the value of the economic benefit received by the charity. If the charity does not receive an economic benefit, however, a deduction is denied. The result of allowing a deduction only for the amount of the economic benefit received by the charity seems to be reached

141. Letter Ruling 8011036, Dec. 19, 1979.

142. *Id.* This Letter Ruling states:

A contribution or gift, for the purposes of section 170, is a voluntary transfer of money or property made by the transferor without receipt or expectation of a financial benefit commensurate with the money or property transferred. See section 1.170A-1(c)(5) of the regulations, *H.R. Rep. No. 1337*, 83d Cong., 2d Sess. A44 (1954); *S. Rep. No. 1622*, 83d Cong., 2d Sess. 196 (1954). If the transferor receives (or reasonably expects to receive) a financial benefit that is commensurate with the money or property transferred, no deduction under section 170 is allowable. *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968); *Seed v. Comm'r*, 57 T.C. 265, 278 (1971). If the transferor receives (or reasonably expects to receive) a financial benefit that is substantial but less than the amount of the transfer, then the transaction may involve both a purchase and a gift and, assuming the requirements in that section are otherwise met, a deduction under that section would be allowable only for the excess of the amount transferred over the amount of the financial benefit received or reasonably expected to be received by the transferor. *Oppewal v. Comm'r*, 468 F.2d 1000 (1st Cir. 1972); *DeJong v. Comm'r*, 30 T.C. 896, 899 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962).

143. Letter Ruling 7923064, Mar. 9, 1979; however, Letter Ruling 8006077, Oct. 19, 1979, appears to adopt the *Duberstein* reasoning by citing *DeJong* for the proposition that:

[A] gift is generally defined as a voluntary transfer of property by the owner to another without consideration. If a payment proceeds primarily from the incentive of anticipated benefit to the payer beyond the satisfaction that flows from the performance of a generous act, it is not a gift and is not deductible for federal income tax purposes.

144. This holding is inconsistent with Revenue Rulings allowing deductions when substantial return benefits are received. *See, e.g.*, Rev. Rul. 76-232, 1976-1 C.B. 62; Rev. Rul. 67-246, 1967-2 C.B. 104.

145. Letter Ruling 7102040200A, Feb. 4, 1971. This Letter Ruling is essentially identical to Rev. Rul. 71-269, note 120 *supra*.

regardless of the type of analysis used.¹⁴⁶ Thus, the holdings of most of the cases and rulings seem to be consistent.

The reasoning used to decide this type of case, however, has indeed become a "mare's nest"¹⁴⁷ partly because of the application of the *Duberstein* "detached and disinterested generosity" test. *Duberstein* is an income exclusion case under what is now section 102 of the Internal Revenue Code. There are compelling reasons for carefully scrutinizing the possible disguise of compensation for services rendered as a gift.¹⁴⁸ Section 102(a) of the Code allows taxpayers to exclude gifts from income. Compensation for services is, of course, taxable income.¹⁴⁹ Therefore, taxpayers have a strong incentive to classify a transfer as a gift rather than as compensation. Accordingly, section 102 of the Code has been strictly construed by the courts.¹⁵⁰ Although the legislative purpose of section 102 of the Code is not entirely clear,¹⁵¹ the courts have taken a restrictive attitude toward classifying transfers as gifts and the "detached and disinterested generosity" test of *Duberstein* reflects this restrictive attitude.

The charitable contribution deduction, on the other hand, is not an income exclusion provision, but has quite different purposes from the gift exclusion under section 102, and has not been strictly construed. The charitable contribution deduction has been referred to as a "liberalization of the law in the taxpayer's favor . . . begotten from motives of public policy" and as a provision that is "not to be narrowly construed."¹⁵² In addition, the government benefits from charitable contributions because private generosity helps provide services to the public that otherwise would be provided by government. For example private donations support, in whole or in part, worthwhile institutions such as hospitals and universities that, absent private support, might have to rely upon greater amounts of government aid. Also, private charity supports religious organizations that could not be supported by the government because of constitutional limitations.¹⁵³ Therefore, although the deduction for charitable contributions causes some revenue loss to the government, the persuasive reasons for liberally construing section 170 do not exist in favor of section 102.

146. See, e.g., *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971); Rev. Rul. 79-99, 1979-1 C.B. 108, see note 135 *supra*.

On virtually identical facts, these authorities reach virtually identical holdings, but adopt strikingly different methods of analysis to reach the holdings.

147. *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967); *cert. denied* 389 U.S. 976 (1967). See note 69 *supra* and accompanying text.

148. See note 72 and accompanying text, *supra*. See also *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967), *cert. denied* 389 U.S. 976 (1967); *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1978).

149. I.R.C. § 61(a)(1).

150. See *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949).

151. See Klein, *supra* note 13.

152. *Helvering v. Bliss*, 293 U.S. 144, 151 (1935).

153. U.S. CONST. amend. I.

Moreover, the *Duberstein* reasoning forces courts, and the Internal Revenue Service, to try to see into the minds of donors to determine if all or part of a transfer to a charity comes from "detached and disinterested generosity."¹⁵⁴ It is especially difficult to determine a person's motives when a transfer is inspired both by generosity and by the expectation of a return benefit, as in the situation where a parent transfers money to a school attended by his or her child. Determination of a person's motives is even more difficult when a transfer has been guided by skillful counsel aware of the "detached and disinterested generosity" standards adopted by some courts.

The *Duberstein* test can lead to anomalous results because many transfers are, to a greater or lesser degree, motivated by selfish reasons. For example, individuals or businesses may give to charities solely to enhance their reputations by being listed as a "patron" of a symphony orchestra or museum or by having a college building or scholarship fund named after them. It is also common for people to attend charity balls or similar affairs strictly for the social prestige and publicity to be gained from attending. In addition, many people contribute to their churches because they believe that they have a moral obligation to do so.

The *Duberstein* test, if strictly applied, can require the peculiar result of allowing a deduction to one individual while denying it to another whose behavior and economic detriment is identical to the first's. For example, a person may buy a ticket, at higher than fair market value, for a performance of a ballet sponsored by a charity. If he loves the ballet, feels that the ticket is worth the cost because of the quality of the performance and because of the social prestige of attending the event, but dislikes the charity, he will be denied the deduction under the *Duberstein* reasoning because he has no "detached and disinterested generosity." Another individual, however, who buys a ticket to the same performance to support the charity, but who dislikes the ballet and has no interest in the prestige of attending, will be allowed the deduction for the excess of the amount paid over the value of the performance because he has the necessary donative intent. Thus, under the *Duberstein* reasoning, one person would be allowed a deduction and another denied a deduction even though they both

154. See discussion of *Crosby Valve & Gage Co. v. Commissioner*, 380 F.2d 146 (1st Cir. 1967) *cert. denied* 389 U.S. 976 (1967), note 72 and accompanying text, *supra*. The *Crosby Valve & Gage Co.* court pointed out that if the policy of the income tax law favoring charitable contributions is to be effectively carried out, there is good reason to avoid unnecessary intrusion of subjective judgments as to what prompts gifts to charities. The court predicted that if the subjective test of *Duberstein* is used in charitable contribution cases "an important area of the tax law would become a mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality." *Id.* at 146. In addition, the "detached and disinterested generosity" test creates a difficult administrative burden in that, literally applied, the *Duberstein* test would require the Internal Revenue Service to examine the motives of all people or businesses that give to charity to determine if they have the necessary "detached and disinterested generosity."

suffered exactly the same economic detriment and the charity received the same economic benefit.¹⁵⁵

The requirement that a gift be motivated by "detached and disinterested generosity" also creates serious problems with respect to charitable contributions by corporations. While it is clear that corporations may make deductible charitable contributions,¹⁵⁶ it is not clear that corporations may make gifts motivated by detached and disinterested generosity without being *ultra vires*. This was pointed out in *United States v. Transamerica Corp.*,¹⁵⁷ where the court stated: "Further, an absolute requirement of detached and disinterested generosity or lack of any business purpose would tend to render *ultra vires* substantially all charitable contributions and thus to frustrate the congressional intent that corporations should enjoy such deductions".¹⁵⁸ Furthermore, the Tax Court in *Dockery v. Commissioner*,¹⁵⁹ specifically rejected the *Duberstein* rationale with this statement: "[W]hile the *Duberstein* criteria may still hold validity with respect to charitable contributions made by individuals . . . we believe these criteria are inappropriate to determine if a business entity, such as a corporation or partnership has made a charitable contribution entitling it to a deduction under section 170."¹⁶⁰ Therefore, the requirement of "detached and disinterested generosity," could cause disallowance of deductions for charitable contributions by businesses, a result clearly inconsistent with the statute.¹⁶¹

Additionally, the committee reports under what is now section 162(b), the only legislative history that is pertinent, states that charitable contributions or gifts are "those contributions which are made with no expectation

155. Apparently, it is the position of the Internal Revenue Service that under these circumstances each purchaser should receive a deduction equal to the difference between the amount transferred and the value of the benefit received in return, without regard to the intent of the donor. See Rev. Rul. 67-246, 1967-2 C.B. 104. Another example of the strange results that would be reached by a literal application of the *Duberstein* test would be that a person who gives all of his property to a charity disliked by his heirs because he hates his heirs and wants them to inherit nothing would be denied because he would not have the necessary "detached and disinterested generosity."

156. See I.R.C. § 170(b)(2); *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971).

157. 392 F.2d 522 (9th Cir. 1968).

158. *Id.* at 524.

159. 37 T.C.M. (CCH) 317 (1978).

160. *Id.* at 320-21. Thus the Tax Court apparently believes a different standard should apply to charitable contributions by business entities than that applied to individuals. This distinction is wholly unsupported by § 170, the Income Tax Regulations, legislative history and previous case law.

161. If, however, a payment to a charity by a corporation does not qualify as a deduction under § 170 because it was not made with "detached and disinterested generosity," it may nevertheless be deductible under § 162(a) as an ordinary and necessary business expense. Section 162(b) limits the business expense deduction to amounts that would be deductible as charitable contributions under § 170. A rigorous application of the *Duberstein* test to transfers by corporations and other businesses to charities would result in no charitable contribution deduction being allowed because of a lack of "detached and disinterested generosity." If payments by businesses to charities are not deductible charitable contributions, a result the *Duberstein* test seems to require, they would be deductible under § 162(a) as ordinary and necessary business expenses without any limitation imposed by § 162(b). Therefore, a rigorous and consistent application of the *Duberstein* test to transfers by businesses would have the anomalous effect of making § 162(b) meaningless. See note 39 *supra*.

of a financial return commensurate with the amount of the gift,"¹⁶² rather than those made from particular generous motives. Thus, there is no support in section 170, its legislative history or in the Income Tax Regulations for use of the *Duberstein* "detached and disinterested generosity" test.

In summary, there are clear reasons why the *Duberstein* test should not be applied in charitable contribution cases. The *Duberstein* test is not required by section 170 or the income tax regulations under section 170. *Duberstein* was decided under section 102 of the Internal Revenue Code, a section that has different purposes from section 170. Also, the *Duberstein* analysis is inconsistent with corporate charitable contribution deductions and with the only relevant legislative history. Therefore, it seems clear that the *Duberstein* "detached and disinterested generosity" test should not apply to charitable contribution deductions.

The *Duberstein* "detached and disinterested generosity" test gives no clear guidance to taxpayers in planning charitable transfers, or to the Internal Revenue Service and the courts in evaluating claimed charitable deductions because it requires analysis of the taxpayers' subjective motives. Taxpayers have a right to a clear standard to determine their deductions and the Internal Revenue Service and the courts need a clear standard to use in deciding controversies. The *Duberstein* test, by its subjective nature, can never provide a clear standard and should be abandoned.

The reasoning of *Singer Co. v. United States*,¹⁶³ which allows no deduction if the donor receives a benefit greater than the benefit that would inure to the general public because of a donation, can result in an inappropriate result. For example, few would deny that a two dollar deduction should result if a person pays five dollars to his church for a dinner that is only worth three dollars.¹⁶⁴ The dinner, however, is clearly a substantial benefit that would not inure to a member of the general public who makes a gift to the church. Under the *Singer* reasoning the receipt of the dinner would eliminate the deduction.

The third line of reasoning that is applied to charitable contribution cases is used by the First Circuit in *Oppewal v. Commissioner*,¹⁶⁵ *Mason v.*

162. H. R. REP. NO. 1337, 83rd Cong., 2d Sess., 44A, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4013, 4180; S. REP. NO. 1622, 83rd Cong., 2d Sess., 196, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4621, 4830-31. The language of these committee reports is reflected in Treas. Reg. § 1.170A-1(c)(5), T.D. 7207, 1972-2 C.B. 106.

163. 449 F.2d 413 (Ct. Cl. 1971).

164. See Rev. Rul. 67-246, 1967-2 C.B. 104. This Revenue Ruling states:

"As a general rule, where a transaction involving a payment is in the form of a purchase of an item of value, the presumption arises that no gift has been made for charitable contribution purposes, the presumption being that the payment in such case is the purchase price." *Id.* at 105. There is no support in the law for the existence of this presumption. The burden of proof in litigation, however, would generally be on the taxpayer to demonstrate that a deduction should be allowed. Tax Court Rule 142.

165. 468 F.2d 1000 (1st Cir. 1972).

United States,¹⁶⁶ and some Revenue Rulings.¹⁶⁷ Under this test an essentially objective analysis is used without regard to the subjective question of whether the donor acted from "detached and disinterested generosity." This line of reasoning best reflects the purposes of the charitable contribution deduction because it allows a deduction for the value of the benefit to the charity and the detriment to the donor, but it does not disallow a deduction because the donor receives a return benefit. It is also administratively feasible because it provides a clear, objective test to be used by taxpayers, the Internal Revenue Service, and the courts.

IV. A PROPOSED TEST OF DEDUCTIBILITY

The *Oppewal* reasoning is a basic part of the proposed test. The proposed test provides an objective method of determining whether there is a deductible charitable contribution and its amount. It reflects the holdings and the unarticulated reasoning of most of the cases and Revenue Rulings, and is administratively feasible.

The first element of the test is that there must be an intent to make a gift to a charity. This is consistent with the common law definition of gift and appears to be required by section 170 as well, although it is not often articulated in the cases or Revenue Rulings.¹⁶⁸ The intent would not, however, be determined by the *Duberstein* "detached and disinterested generosity" test. Rather, the required intent would be simply the intent that the taxpayer give up something of value and that the charity receive something of value. The taxpayer's motives beyond whether there was an intent to confer a benefit on the charity would be irrelevant.

A threshold determination that there was an intent to make a gift is necessary in order to avoid the allowance of a deduction for what is, in reality, a bad business bargain between the taxpayer and a charity. For example, in *Rusoff v. Commissioner*,¹⁶⁹ the taxpayers transferred patent interests to Columbia University in exchange for royalties arising from the patent. The transaction did not produce the astronomical profits expected and the taxpayers attempted to treat the transfers as a bargain sale, deducting part of the value of the patent interests. The Tax Court held that the taxpayers "expected to receive, directly and indirectly, financial benefits fully commensurate with the value of the property transferred."¹⁷⁰ Accordingly, *Rusoff* held that a transfer that was, in effect, a business transaction that failed to produce a profit could not be characterized as a

166. 513 F.2d 25 (7th Cir. 1975).

167. See, e.g., Rev. Rul. 67-246, 1967-2 C.B. 104.

168. While not often articulated, a conclusion that there was no intent to make a gratuitous transfer appears to underlie many decisions when all deductions are denied. See, e.g., *Marquis v. Commissioner*, 49 T.C. 695 (1968).

169. 65 T.C. 459 (1975).

170. *Id.* at 469.

deductible charitable contribution. In other words, there was no intent to confer a benefit on the university.¹⁷¹

Second, after it has been determined that there has been a transfer with the intent to benefit the charity, it is necessary to determine if the transferor received or expected to receive a benefit in return for the transfer. If the transferor receives no benefit or a benefit that is incidental, the deduction will be allowed for the full value of the transferred property.¹⁷² Thus, in the typical situation if a person contributes money to his church or college, a deduction is allowed for the entire amount because only incidental benefits are received in return.

The third and last step in the analysis of a charitable contribution is the determination whether the transferor receives a benefit that is greater than an incidental benefit, that is, a "substantial" or "direct" benefit,¹⁷³ as opposed to an "incidental" benefit.¹⁷⁴ If the benefit received in return is commensurate with the value transferred the deduction will be denied in its entirety.¹⁷⁵ Denial of the deduction if the donor receives a commensurate return benefit is consistent with the purposes of section 170 because the charity receives no economic benefit and the taxpayer suffers no economic detriment.¹⁷⁶ For example, if a taxpayer purchases a book worth twenty-five dollars for twenty-five dollars from a charity, he is no poorer. His

171. It seems clear that the same result would be reached if a taxpayer sold property to a charity (for example, land to a hospital) for less than its fair market value because of mistake, poor judgment, or inadvertence. There would be no gift for § 170 purposes, because the intent of the transfer was not to confer a benefit on the charity and a deduction would therefore be denied.

Similarly, a transfer made in the ordinary course of business at arm's length and free from any donative intent is not considered a taxable gift, for gift tax purposes, even if the property transferred was worth more than the benefit received in return by the transferor. *See* Treas. Reg. 25.2512-8 (1958). The requirement that there be an intent to confer a benefit on the charity is shown by the cases which hold that a deduction is to be denied if the transferor expects to receive a financial benefit commensurate with the money or property transferred. *See* *Rusoff v. Commissioner*, 65 T.C. 459 (1975); *Grinslade v. Commissioner*, 59 T.C. 566 (1973). *See also* *Dowell v. United States*, 553 F.2d 1233 (9th Cir. 1977); *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975); *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970).

172. Generally, the satisfaction that flows from a generous act is defined as an incidental benefit that will not reduce or eliminate the charitable deduction. *See, e.g., Knott v. Commissioner*, 67 T.C. 681 (1977). Also, benefits that all members of the public, including the donor, share are incidental benefits. *See* *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971).

Accordingly, a taxpayer who transfers land to a city for use as a park will not be denied a deduction because he, as well as the rest of the public, may use it. Similarly, a donor who gives money to a hospital will not be denied a deduction because he, as well as the rest of the public benefits from improved health care. *See generally id.*

173. *See* *Collman v. Commissioner*, 511 F.2d 1263 (9th Cir. 1975); *Murphy v. Commissioner*, 54 T.C. 249 (1970).

174. *See* *Citizens & S. Nat'l Bank v. United States*, 243 F. Supp. 900 (W.D.S.C. 1965); *Sutton v. Commissioner*, 57 T.C. 239 (1971); Rev. Rul. 68-432, 1968-2 C.B. 104.

175. *See* *Sedam v. United States*, 518 F.2d 242 (7th Cir. 1975); *Louisville & Nashville R.R. v. Commissioner*, 66 T.C. 962 (1976); *Grinslade v. Commissioner*, 59 T.C. 566 (1973).

176. This conclusion is also consistent with the definitions of charitable contributions contained in the legislative history of § 162(b). H.R. REP. NO. 1337, 83rd Cong., 2d Sess., A44, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4013, 4120; S. REP. NO. 1622, 83rd Cong., 2d Sess., 196, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4621, 4830-31.

wealth has merely changed form from cash to a book. Similarly, the charity is no richer. Its wealth has merely changed form from a book to cash. The fact that the charity may make a profit on the sale of the book does not alter this fact.¹⁷⁷

If the transferor receives a return benefit that is substantial or direct, but which is not commensurate with the value transferred, a deduction will be allowed for the difference between the value of the amount transferred and the value of the benefit received.¹⁷⁸ Once again, this result is consistent with the purposes of section 170. In this situation, the taxpayer has given up an economic benefit, and the charity has received an economic benefit. It is appropriate, therefore, that the taxpayer be allowed a deduction for the amount of his economic detriment.¹⁷⁹

The approach to charitable contribution deductions outlined in this Article appears to be the actual, unarticulated reasoning used by the courts in almost all cases and by the Internal Revenue Service in almost all Revenue Rulings. The cases of *DeJong v. Commissioner*,¹⁸⁰ *Oppewal v. Commissioner*,¹⁸¹ *Haak v. United States*,¹⁸² and Revenue Ruling 79-99¹⁸³ represent the most striking examples of the divergent reasoning used to reach similar results. In these cases, and in the Revenue Ruling, the facts and the holdings are virtually identical, but the rationales leading to the holdings are inconsistent. Use of the test suggested would enable a court to reach the same conclusion as those reached in the cases and in the Revenue Ruling, but would make clear the real reasoning behind the conclusions. The test would also eliminate the necessity of delving into whether a transfer was motivated by "detached and disinterested generosity." Adoption of the test suggested would thus not only eliminate much of the confusion in this area of the law but also would be consistent with the purposes of section 170.

177. See *Rusoff v. Commissioner*, 65 T.C. 459 (1975).

178. See *Oppewal v. Commissioner*, 468 F.2d 1000 (1st Cir. 1972); *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962); *Haak v. United States*, 451 F. Supp. 1087 (W.D. Mich. 1968); Rev. Rul. 79-99, 1979-1 C.B. 108, see note 135, *supra*; Rev. Rul. 67-246, 1967-2 C.B. 104.

179. In most situations the detriment to the donor and the benefit to the charity will be equal in value. For example, if a person pays \$5.00 to his church, the detriment to the donor and the benefit to the church are both \$5.00. The benefit to the charity and the detriment to the donor may not, however, always be the same. For example, a church may collect handguns that it will destroy with the hope of reducing violence. The detriment to the donor, assuming no substantial return benefit, will be the fair market value of a donated handgun. It could be argued, however, that there is no economic benefit to the church. In such a case it seems reasonable that the deduction should be the amount of the donor's detriment, since it is the donor's tax situation that is affected by the transfer, and because of the policy of encouraging charitable contributions.

180. 309 F.2d 373 (9th Cir. 1962).

181. 468 F.2d 1000 (1st Cir. 1972).

182. 451 F. Supp. 1087 (W.D. Mich. 1978).

183. 1979-1 C.B. 108. See note 135, *supra*.

